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In the Supreme Court of the United States.

OCTOBER TERM, 1939.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,
vs.
MARY Q. HALLOCK and CENTRAL UNITED NATIONAL BANK OF CLEVELAND, Trustees,
Respondents.
No. 110.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,
vs.
MARY Q. HALLOCK, EXECUTRIX, Estate of Henry Hallock, deceased,
Respondent.
No. 111.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,
vs.
S. H. SQUIRE, Superintendent of Banks of the State of Ohio in Charge of Liquidation of The Union Trust Company, Successor of The First Trust and Savings Company, Trustee, Cleveland, Ohio,
Respondent.
No. 112.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

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STATEMENT.

The questions presented and the facts are correctly stated in the petition for writs of certiorari and require

little elaboration. The amount of the deficiency estate tax payable by the Estate of Henry Hallock, if the petitioner's contention that the alimony trust in question should be included in the gross estate under Section 302 (c) of the Revenue Act of 1926 should be ultimately sustained, would be $596.69, exclusive of interest.

Although if is set forth in the petition, for convenient reference that part of the Trust Agreement of September 3, 1919, providing for the disposition of the trust corpus after the death of the life beneficiary, which we believe to be the only material part of the Trust Agreement, is repeated:

> "C. If and when Anne Lamson Hallock shall die, then and in such event and thereupon the within trust shall terminate and said Trustee shall and will pay Party of the First Part if he then be living any accrued income, then remaining in said trust fund and shall and will deliver forthwith to Party of the First Part, the principal of the said trust fund. If and in the event said Party of the First Part shall not be living then and in such event payment and delivery over shall be made to Levitt Hallock and Helen Hallock, respectively, son and daughter of Party of the First Part, share and share alike. If and in the event either said Levitt Hallock or Helen Hallock shall at such time be dead, the share which would have gone to him or her if living, shall go to the children of such deceased child and if there be no such children living, then said entire income and principal shall be paid to that child of Henry Hallock then living."

SUMMARY OF ARGUMENT AGAINST ISSUANCE OF THE WRITS.

1. The Circuit Court of Appeals correctly applied the decisions in *Helvering v. St. Louis Union Trust Company*, 296 U. S. 39 and *Becker v. St. Louis Union Trust Company*, 296 U. S. 48.

2. The decisions in the *St. Louis Union Trust Company* cases are sound and do not conflict with the decision of this Court in *Klein v. United States*, 283 U. S. 231.

3. The language of Section 302 (c), as interpreted by the decisions, is amply effective to accomplish its purpose, but if it lacks substance in any respect the remedy lies only in legislative amendment.

ARGUMENT.

I.

In determining whether or not the Hallock Trust Agreement was a transfer intended to take effect in possession or enjoyment at or after the grantor's death, within the meaning of Section 302 (c) of the Revenue Act of 1926, there is no valid distinction between the Trust Agreement and the trust instruments involved in *Helvering v. St. Louis Union Trust Company*, 296 U. S. 39, and *Becker v. St. Louis Union Trust Company*, 296 U. S. 48. The Circuit Court of Appeals could see none and held that those cases were controlling of the question.

The petitioner attempts, as he did in the Circuit Court of Appeals, to distinguish the Hallock trust. He says that the remainder, which was given to the Hallock children, was not one subject to defeasance by a condition subsequent, but was subject to a condition precedent, namely "that the settlor die during the continuance of the trust."

But the condition is precisely of the same kind as in both of the *St. Louis Union Trust Company* cases. The Trust Agreement in *Helvering v. St. Louis Union Trust Company* provided for the payment of the income to the grantor's daughter for life, with remainder over to named persons, with the added provision that if the daughter should predecease the grantor, the trust should terminate and the trust estate should be paid over to him. The decla-

rations of trust in *Becker v. St. Louis Union Trust Company* each named one of the grantor's children as beneficiary of certain of the income and provided:

> "If the said beneficiary should die before my death, then the trust estate shall thereupon revert to me and become mine immediately and absolutely, or if I should die before her death, then the property shall thereupon become hers immediately and absolutely."

If the Hallock children's remainder was one subject to a condition precedent, then so were the remainders in the *St. Louis Union Trust Company* cases, for manifestly they cannot be differentiated. But in all of the trust instruments under consideration, in the words of the opinion in *Helvering v. St. Louis Union Trust Company*, the grantor "left in himself no power to resume ownership, possession or enjoyment, except upon a contingency in the nature of a condition subsequent, the occurrence of which was entirely fortuitous so far as any control, design or volition on his part was concerned."

We submit that the petitioner's contention that the court below misapplied the *St. Louis Union Trust Company* decisions has no shadow of plausibility.

II.

Apparently it is more seriously urged as a ground for granting the petition that there is no satisfactory distinction between the *St. Louis Union Trust Company* cases and *Klein v. United States*, 283 U. S. 231, and that the *St. Louis Union Trust Company* cases should be overruled. It is submitted that the distinction between these cases is not merely formal, but is substantial and fundamental and that they are in no respect conflicting.

The *Klein* case was examined in *Helvering v. St. Louis Union Trust Company* and was thus distinguished in the opinion of the Court:

"The case of *Klein v. United States*, 283 U. S. 231, which is strongly relied upon by the Government, does not support its position. There the grantor, 15 months prior to his wife's death, conveyed to his wife by deed a life estate in certain lands. But in the event that she survived the grantor 'and in that case only' she was to take the lands in fee simple. The effect of this deed, we held, was that only a life estate was vested, the remainder being retained by the grantor; and whether that should ever become vested in the grantee depended upon the condition precedent that the grantor die during the life of the grantee. The grantor having died first, his death clearly effected a transmission of the larger estate to the grantee. But here the grantor parted with the title and all beneficial interest in the property, retaining no right with respect to it which would pass to anyone as a result of his death. Unlike the *Klein* case, where the death was the generating source of the title, here, as the court below said, the trust instrument and not the death was the generating source. The death did not transmit the possibility, but destroyed it."

No reversion was retained by the grantor in the *St. Louis Union Trust Company* cases. Instead, a remainder was given to third persons. Nothing remained in the grantor, except a possibility of reverter in case the life beneficiary should predecease him. The property could only revert to him upon the happening of a condition precedent. The remainder of the third parties, on the other hand, was created by the trust instrument and was subject to be divested only by the happening of a condition subsequent. The death of the grantor put an end to the condition subsequent, but transmitted no interest in property or effected no real change in the quality of any interest, as it did in the *Klein* case. In the language of the opinion in *Helvering v. St. Louis Union Trust Company*— "the only death which could have had such effect was that

of the daughter, the grantee; and that event did not take place." Therefore, in the one case the property was transmitted by the death of the grantor; in the other, it could only have been transmitted by the death of the grantee.

The reality and substantiality of the above discussed differences in the future interests appear clearly from the *Restatement of the Law-Property-Future Interests* (Parts 1 and 2). At page 525 a definite distinction is made between a reversion and a possibility of reverter; the one being a reversionary interest not subject to a condition precedent, and the other such an interest which is subject to a condition precedent. At page 541 remainders are divided into four classes: (a) indefeasibly vested; or (b) vested subject to open; or (c) vested subject to complete defeasance, or (d) subject to a condition precedent. The note on terminology on page 542 shows that the first three classes are vested remainders, but that class (d), a remainder subject to a condition precedent, is contingent. And at page 557 it is stated that the complete defeasibility essential to a remainder of the class (c) type can exist because of a possibility of reverter.

Under these definitions and principles, the trust instruments in the *St. Louis Union Trust Company* cases created vested remainders of the class (c) type, which were subject to defeasance, not upon the happening of a condition precedent, but because of a possibility of reverter, a plain condition subsequent so far as the remainders are concerned. The reversionary interest of the grantor, however, did not have even the dignity of a reversion, but was an interest subject to a condition precedent. In the *Klein* case the situation was reversed; the retained interest of the grantor was a true reversion which was not subject to a condition precedent, but to a condition subsequent and was therefore vested; while the wife's re-

mainder was of the class (d) type, because subject to a condition precedent, and therefore contingent.

The question had been before this Court prior to the decisions in the *St. Louis Union Trust Company* cases. In *Helvering v. Duke,* 290 U. S. 591, judgments of the Board of Tax Appeals and the Circuit Court of Appeals in favor of the taxpayer in a similar case were affirmed by an equally divided Court. The question has, therefore, been once re-examined in the *St. Louis Union Trust Company* cases. These cases have been followed by this Court in *Bingham v. United States,* 296 U. S. 211, and in the decisions of the lower Federal Courts and the Board of Tax Appeals.

One of the transfers held to be non taxable by the opinion in *Hassett v. Welch,* 303 U. S. 303, on the ground that the amendment to Section 302 (c) by the Joint Resolution of March 3, 1931, does not operate retroactively, was similar to those in the *St. Louis Union Trust Company* cases, in that the property would have reverted to the grantor if she had survived her son. The Government could have raised in that case the same contentions made in its petition here, but did not do so. Apparently the *St. Louis Union Trust Company* cases were assumed to be controlling.

The line between the *St. Louis Union Trust Company* cases and the *Klein* case is clearly and satisfactorily defined, both as a matter of principle and practical tax administration. If they should now be re-examined and overruled only confusion and uncertainty can result.

III.

The petition complains that various decisions of this Court, including the *St. Louis Union Trust Company* decisions, have deprived the language of Section 302 (c) of virtually any substance and that the problem cannot readily

be dealt with by amendatory legislation. This comes close to saying that when the language of a taxing statute fails to reach the objects which its administrators think it desirable to reach, this Court should help it out. Of course, the rule of interpretation is the reverse.

For some time the Government thought that the clause "intended to take effect in possession or enjoyment at or after his death" should and did reach transfers where the grantor retained a life estate. When this Court held that this was not so,[1] a great deal of substance departed from the statute, but Section 302 (c) was amended without too great difficulty so as to restore it by making such transfers taxable.[2]

The "deprivation of substance" argument could be invoked with equal force in favor of overruling other decisions of this Court limiting the scope of the phrase under consideration. For example, in *Reinecke v. Northern Trust Company*, 278 U. S. 239, the Court refused to construe the statutory language as taxing an inter-vivos transfer taking the form of a life estate in one other than the grantor, with remainder over to another.

The truth is that this Court has consistently construed Section 302 to apply to transfers where the grantor retained in himself some real element of property which passed to others as a result of his death, but has always reached the opposite interpretation where the transfer leaves nothing in the grantor, even though his death may cause some change in the quality of the estates of others.

Under the present express language of Section 302 and the interpretative decisions, in addition to transfers in

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[1] *May v. Heiner*, 281 U. S. 238;
Burnet v. Northern Trust Company, 283 U. S. 782;
Morsman v. Burnet, 283 U. S. 783;
McCormick v. Burnet, 283 U. S. 784.

[2] *Joint Resolution of March 3, 1931.*

contemplation of death, so many types of inter-vivos transfers remain subject to the estate tax that it is not true that the statute has lost any real vitality.

The history of the statute has been that whenever it has been construed as not embracing a particular kind of transfer which Congress has thought to be a proper object of taxation, amendments have promptly followed. But since November 11, 1935, when the *St. Louis Union Trust Company* cases were decided, four separate Revenue Acts have been enacted. One of them was designed as a "loophole" closing measure. Another amended Section 302 itself.[1] It would be difficult to find a stronger case of legislative acquiescence or implied approval. It seems clear that Congress has not entertained the same views of the *St. Louis Union Trust Company* decisions as are voiced in the petition.

There could have been no real difficulty in an amendment, had it been considered desirable. The Treasury Department had no trouble in amending the Estate Tax Regulations to conform to the decisions in the *St. Louis Union Trust Company* cases. By the amendment to Regulations 80 (pages 20 and 21 of the petition) the phrase—"a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer where the title remained in the decedent "and the passing thereof was subject to the condition precedent of his death," and does not include a transfer where no title remained in the decedent even though there is a provision "that the property was to revert to the decedent upon the predecease of some other person or persons or the happening of some other event."

This amendment states very succinctly the real distinction between the *Klein* case and the *St. Louis Union*

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[1] Section 805 (a), Revenue Act of 1936.

Trust Company cases. Surely, there can be no difficulty, such as the petition claims, in determining whether the death of the grantor constitutes a condition precedent to the passing of property or merely an event extinguishing a possibility of reverter.

CONCLUSION.

In its essence the petition is asserting that the administrative branch of the Government is finding statutory language, as interpreted by the decisions, to be "unsatisfactory." It is said that the legislative branch, to which the matter obviously belongs, cannot, for reasons somewhat obscure, frame a statute which will be satisfactory. This Court is therefore asked to take over the task. The case at bar, involving less than $600.00, is only the vehicle for the petition to the judicial branch to assume these basically legislative functions.

Even counsel for the Government cannot say more than that the distinction between the *Klein* and *St. Louis Union Trust Company* cases is not a satisfactory one. If cases which have been followed by this Court and which have been relied upon by Bench and Bar for four years are re-examined for reasons such as these, there can be no element of finality to any decision.

Respectfully submitted,

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